

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LIBERTY PLACE RETAIL ASSOCS.           :           CIVIL ACTION  
                                          :  
                                          :  
                                          :  
FAMIGLIA INT'L, INC.                   :           NO. 05-1463

MEMORANDUM

**Padova, J.**

**August 11, 2005**

In this action, the Plaintiff, a commercial landlord, confessed judgment against the Defendant, the contractual guarantor of a tenant's lease. Defendant has filed a Motion for Relief from Judgment, requesting that the judgment be stricken or opened pursuant to Federal Rule of Civil Procedure 60(b)(6). For the reasons that follow, Defendant's motion to strike the judgment is denied, and its motion to open the judgment is granted.

I. BACKGROUND

In June 2003, Defendant Famiglia International (hereinafter the "Guarantor"), entered into a Guaranty with Liberty Place Retail Associates (the "Landlord") to ensure that the Landlord would receive rent from Famiglia of Liberty Place (the "Tenant"), a pizzeria leasing space in Landlord's food court. Under the Guaranty, Guarantor guaranteed the prompt payment of rent by the Tenant, provided that if Tenant defaulted during the first three years of the lease, Guarantor's liability would not exceed the first three years' rent. (Guaranty at 1.) Guarantor further agreed that in the event Tenant defaulted, Landlord could confess judgment against Guarantor for all sums due under the Guaranty plus

an attorney's fee of five percent of the amount due. (Guaranty at 3.)

The approximately ten-year Retail Lease Agreement (the "Lease") between Landlord and Tenant provided for a minimum rent of \$11,087.50 per month during the first three years, (Lease at 2), an amount based on the expectation that Tenant's gross revenue would exceed one million dollars per year. (Def.'s Mot. ¶ 8.) When Tenant's actual revenue turned out to be only \$350,000 per year, (id.), Landlord and Tenant executed the First Amendment to the Lease, which adjusted the rent to \$3,326.25 per month from January 1, 2004 to August 31, 2004. (First Amendment at 1.) In September 2004, Landlord drafted a Second Amendment to the Lease, which would continue the reduced rent through June 2005. (Second Amendment at 1.) The parties now dispute whether the Second Amendment ever took effect.

In January 2005, Landlord notified Tenant and Guarantor that Tenant had failed to pay all rent when due, and Landlord demanded that Tenant cure its default. (Pl.'s Mem. at 3.) When Tenant did not comply, Landlord accelerated the rent due and demanded payment in full, which totaled over \$1,700,000. (Id.) Neither Tenant nor Guarantor made this payment, and in March 2005, Landlord confessed judgment against Guarantor in the amount of \$424,905.62. (Pl.'s Mem. at 4.) That figure represented three full years' rent, calculated according to Second Amendment, plus an attorney's fee of

\$20,233.60, which was five percent of the three full years' rent.  
(Id.)

## II. MOTION TO STRIKE

Guarantor requests that the Court strike the Confessed Judgment on the ground that it lacks proper instructions regarding the procedure to follow to strike the judgment. A motion to strike a confessed judgment should be granted if a "fatal defect or irregularity appears on the face of the judgment." F.D.I.C. v. Deglau, 207 F.3d 153, 167 (3d Cir. 2000). Indeed, absent strict compliance with the Rules of Civil Procedure as well as "rigid adherence to the provisions of the warrant of attorney," a confessed judgment cannot stand. First Union Nat'l Bank v. Portside Refrigerated Servs., 827 A.2d 1224, 1231 (Pa. Super. Ct. 2003) (citation omitted). Guarantor contends that the Confessed Judgment was facially defective because it did not provide Guarantor with accurate instructions for striking the judgment. (Def.'s Mem. at 4.) Guarantor relies on the 2000 version of 42 Pa. Cons. Stat. Ann. § 2731.1, which reads in pertinent part: "[a]t the time a creditor files for a judgment by confession . . . the creditor filing the judgment shall provide the debtor with written instructions regarding the procedure to follow to strike the judgment." That statute has since been modified. The provision requiring such instructions has been deleted, and a new subsection has been added which states:

A judgment shall not be stricken or opened because of a creditor's failure to provide a correctly identified debtor with instructions pursuant to this section regarding procedures to follow to strike a judgment . . . .

42 Pa. Cons. Stat. Ann. § 2737.1(b) (2005).<sup>1</sup> As the current statute expressly forbids striking a judgment on the grounds suggested by the Guarantor, the motion to strike the judgment is denied.

### III. MOTION TO OPEN

#### A. Legal Standard

The procedure for opening a confessed judgment in federal court is governed by Federal Rule of Civil Procedure 60(b), which provides that a court may grant relief from a final judgment for several substantive reasons. Fin. Fed. Credit, Inc. v. Callender, Civ. No. 03-4697, 2003 WL 22858389, at \*2 (E.D. Pa. Dec. 2, 2003) (citing Fed. R. Civ. P. 60(b)). The substantive aspects of a motion to open a confessed judgment are governed by state law. Id. (citing Deqlau, 207 F.3d at 166-67). In Pennsylvania,<sup>2</sup> the movant must present clear, direct, precise, and believable evidence of a meritorious defense. Id. (citations omitted). The judgment should be opened if sufficient evidence is produced "which in a jury trial

---

<sup>1</sup> The current version of the statute became effective on November 29, 2004, before Landlord confessed judgment against Guarantor.

<sup>2</sup> The Lease and the Guaranty are both governed by Pennsylvania law. (Lease at 41; Guaranty at 2.)

would require the issues to be submitted to the jury." Id. (quoting Pa. R. Civ. P. 2959(e)). In determining whether the evidence is sufficient for the issues to be submitted to a jury, the Court applies the standard for a directed verdict: it must consider the evidence in the light most favorable to the party moving to open the judgment, accepting all the movant's evidence as true and making all proper inferences in the movant's favor. Id. The issues must be submitted to a jury unless they are "so clear that reasonable minds could not possibly differ over [their] resolution." Greene v. Oliver Realty, Inc., 526 A.2d 1192, 1202 (Pa. Super. Ct. 1987).

#### B. Discussion

Guarantor requests that the Confessed Judgment be opened because it requires Guarantor to pay Landlord rent already paid by Tenant in contravention of the plain language of the Guaranty. Landlord argues that the Guaranty allows it to collect the total rent due under the Lease for the first three years of the Lease, even if Tenant has made payments of rent due. The relevant paragraph of the Guaranty states:

Guarantor . . . hereby irrevocably, unconditionally and absolutely becomes guarantor for the prompt payment by Tenant of all Rent (as that term is defined in the Lease); provided, however, that (i) for the first three (3) Lease Years (as that term is defined in the Lease), Guarantor's liability hereunder shall not exceed the total Rent for the first 3 Lease Years; and (ii) after the 3<sup>rd</sup> Lease Year, Guarantor's liability hereunder

shall not exceed the total Rent for the Lease Year in which the event of default occurs under the Lease . . . .

(Guaranty at 1) (emphasis in the original). Guarantor contends that this paragraph requires it to pay only the balance of rent left unpaid by Tenant during the first three years of the Lease. (Def.'s Mot. ¶ 16.) Landlord contends that Defendant is the guarantor of "all Rent" under Lease, (Guaranty at 1), and that Guarantor's liability for the "total Rent" for the first three years is unqualified by any credit for rent paid by Tenant. (See Pl.'s Resp. at 7-8.)

The Court concludes that the plain language of the Guaranty imposes liability on the Guarantor only for rent unpaid by Tenant during the first three years of the Lease. Guarantor has therefore presented "clear, direct, precise, and believable evidence of a meritorious defense" sufficient to survive a directed verdict. See Callender, 2003 WL 22858389, at \*2. Accordingly, Guarantor's motion to open the Confessed Judgment is granted.<sup>3</sup>

#### IV. CONCLUSION

For the foregoing reasons, Guarantor's Motion for Relief from Judgment is denied to the extent it asks the Court to strike the

---

<sup>3</sup> Guarantor has also asked the Court to open the Confessed Judgment on the grounds that Landlord inaccurately calculated the rent due and that the attorney's fee for the judgment was unreasonable. As the Court has granted Guarantor's motion to open judgment pursuant to Rule 60(b) on the ground that the Confessed Judgment contravenes the plain language of the Guaranty, the Court need not address these arguments.

Confessed Judgment and granted to the extent it asks the Court to open the Confessed Judgment. An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LIBERTY PLACE RETAIL ASSOCS.           :           CIVIL ACTION  
                                          :  
                                          :  
                                          :  
FAMIGLIA INT'L, INC.                   :           NO. 05-1463

**ORDER**

**AND NOW**, this 11th day of August, 2005, upon consideration of Defendant's Motion for Relief from Judgment filed pursuant to Federal Rule of Civil Procedure 60(b), Plaintiff's response thereto, and all attendant and responsive briefing, **IT IS HEREBY ORDERED** that Defendant's Motion for Relief from Judgment is **GRANTED** in part and **DENIED** in part as follows:

1. The Motion is **DENIED** to the extent that Defendant asks the Court to strike the Confessed Judgment;
2. The Motion is **GRANTED** to the extent that Defendant asks the Court to open the Confessed Judgment; and
3. Defendant shall file a responsive pleading in the manner and time required by the Federal Rules of Civil Procedure.

BY THE COURT:

/s/ John R. Padova

---

John R. Padova, J.